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**Benami Transactions (Prohibition) Amendment Bill, 2015**

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## **Benami Transactions (Prohibition) Amendment Bill, 2015**

### **Introduction**

**Benami** transactions is commonly accepted in India is that 'where a person buys property with his own money but in the name of another person or buys property in his own name but subsequently transfers it into the name of another person, without any intention in either case to benefit such other person. The transaction is called '*benami*' and the person in whose name the transaction is effected is called '*benamidar*'.

While generally prevalent in the case of immovable properties-land and buildings-where registration of the property in the name of the owner can only secure his/her legal title, *benami* holding is equally common in respect of various kinds of movable properties. For example, Shares of *companies* are often purchased or applied for and allotted in the names of persons other than the real owner who furnishes the consideration. Businesses are also often carried on through *benamis*<sup>1</sup>.

Most *benamidars* are relations generally husband, wife and children. The objective is to have the benefits of bifurcation of income and wealth without properties going away from the control or area of close relations<sup>2</sup>.

### **Impact of Benami Transactions**

The adverse impact of benami transactions on the country's economy is large. It bifurcates income earning activities into fragments leading to loss of tax revenue for the government which could have been used for the welfare and development of nation. Benami deals are one of the main reason for proliferation of black money in big way and poverty and inequity could not be eliminated unless generation of black money is controlled.

In India, where people prefer to invest their unaccounted wealth in real estate, benami transactions especially in realty sector have become major avenues for holding and generation of black money. These transactions have inflated realty prices, narrowed options for home buyers and kept own house a dream beyond reach for many.

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<sup>1</sup> Benami Transactions, Origin, Development and Arbitration by K. N. Balasubramanian, 1988, Chapter-I, p.4

<sup>2</sup> Govt. Apathy to check Benami Transactions by T. N. Pandey, Chartered Secretary, March,2014, p.275

The benami transactions have been rising year after year. To put an end to such transactions, a Benami Transactions (prohibition) Act was passed in 1988.

### **The Benami Transactions (Prohibition) Act, 1988**

It is a small piece of legislation, consisting of 9 sections with only three substantive sections — sections 3, 4 and 5. Section 2 deals with definitions, where a '*benami* transaction' has been defined as "any transaction in which property is transferred to one person for a consideration paid or provided by another person". This definition is defective in the sense that it does not consider the situation where a property may not be transferred but acquired initially.

Section 3 prohibits benami transactions by enacting that no person shall enter into any *benami* transaction. This does not prohibit purchase of properties in the names of wives or unmarried daughters. However, *benami* nature of such acquisitions shall be presumed. Sub-section (3) of this section provides that whoever enters into any *benami* transaction shall be punishable with imprisonment upto three years or with fine or with both.

Section 4 bars right of recovery of property held benami from the side of the real owner. However, exceptions have been provided in cases of Hindu Undivided Family properties.

Section 5 stipulates that properties held *benami* shall be liable to acquisition by such authority after following the prescribed procedure without payment of any amount for acquisition.

One handicap in administering the Act relates to burden of proof. It is to be discharged by the person who alleges *benami* and this needs a well-organised machinery to carry out proper groundwork and initiate action for acquisition. The substantive provisions of the *Benami* Act can be invoked only when the *benami* nature of deal gets established. Because of this, the impact of the legislation gets diluted.

To remove these infirmities, a new law was proposed by the UPA Government in 2011 to replace the existing Act<sup>3</sup>.

### **Benami Transactions (Prohibition) Bill, 2011**

The Bill was introduced in Lok Sabha on 18 August, 2011 which proposed replacing the Benami Transaction (prohibition) Act, 1988.

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<sup>3</sup> *Ibid.*

The Benami Transactions (Prohibition) Bill, 2011, *inter-alia*, provides for the following, namely:—

- i) it prohibits *benami* transactions by any person, except in the case of *benami* transactions entered into in the name of spouse, brother or sister or any lineal ascendant or descendant;
- ii) it provides that *Benami* property arising out of prohibited *Benami* transaction is liable to confiscation by the Central Government and such property shall vest absolutely in the Central Government without paying any compensation;
- iii) it prohibits right of the *benamidar* to recover property held *benami*;
- iv) it provides that the Initiating Officer, the Approving Authority and the Administrator shall be the authorities for the purposes of the Bill;
- v) it provides that the Adjudicating Authority and the Appellate Tribunal established under the Prevention of Money-Laundering Act, 2002 shall respectively be the Adjudicating Authority and the Appellate Tribunal for the purposes of the Bill and any person aggrieved by an order of Adjudicating Authority may prefer an appeal to the Appellate Tribunal;
- vi) it provides that any party aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court on any question of law;
- vii) it enables the Central Government, in consultation with the Chief Justice of the High Court, to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Bill;
- viii) it provides penalty for entering into prohibited *benami* transactions and for furnishing any false documents in any proceeding under the Bill;
- ix) it provides for transfer of any suit or proceeding in respect of a benami transaction pending in any Court (other than High Court) or Tribunal or before any authority to the Appellate Tribunal as provided in the Bill;
- x) it also proposes to make consequential amendments in the Prevention of Money-Laundering Act, 2002<sup>4</sup>.

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<sup>4</sup> India. 15th Lok Sabha, 58th Report of Standing Committee on Finance (2011-12)

*Benami* Transactions (Prohibition) Bill, 2011 was referred to the standing committee on finance on 13 September 2011. . The Committee presented its report on 26 June 2012 containing the following key recommendations.

- Extension of provisions of Bill to the State of Jammu and Kashmir also in consultation with the State Government , keeping in view the economic gravity,
- Maximum punishment up to 3 years as prescribed under the existing *Benami* Transactions (Prohibition) Act, 1988
- No exemption other than purchasing property, by any person in the name of his/her spouse or unmarried daughter
- Reference to the mandate derived from United Nations Convention Against Corruption to be made.
- Government to look into the entire gamut of exempted as well as non-prohibitive list of transactions and make it minimal so that unscrupulous elements don't circumvent the provisions of the law.
- Income-tax authorities and authorities under the Prevention of Money Laundering Act, 2002 should act in a coordinated manner with registration authorities to track illegal transactions
- Maximum period of six months from the enactment of the law be prescribed to make rules so that fate of *Benami* Transactions (Prohibition) Act, 1988 is not repeated<sup>5</sup>

However, the Bill lapsed when the 15th Lok Sabha was dissolved.

After coming into power in May, 2014 the NDA Government have announced a host of measures to curb black money in domestic economy and abroad demonstrating its seriousness in curbing the generation of unaccounted wealth. The *benami* deals are widespread and is one of the main cause for proliferation of black money. Recognising the limitations under the existing legislation, the *Benami* Transactions (Prohibition) Amendment Bill, 2015 was introduced to strengthen the *Benami* Transactions (Prohibition) Act, 1988,

### **The Benami Transactions (Prohibition) Amendment Bill, 2015**

The *Benami* Transactions (Prohibition) Amendment Bill, 2015 which was introduced in Lok Sabha on May 13, 2015 is aimed at curbing the circulation of undisclosed income in the country which is hidden through *benami* properties. The Bill

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<sup>5</sup> Hindu Business Line, April 12, 2015

seeks to: (i) amend the definition of benami transactions, (ii) establish adjudicating authorities and an Appellate Tribunal to deal with *benami* transactions, and (iii) specify the penalty for entering into *benami* transactions.

The Act, 1988 defines a *benami* transaction as a transaction where a property is held by or transferred to a person, but has been provided for or paid by another person. The Bill amends this definition to add other transactions which qualify as *benami*. Under the Act, an Authority to acquire *benami* properties was to be established by the Rules. The Bill seeks to establish four authorities to conduct inquiries or investigations regarding *benami* transactions: (i) Initiating Officer, (ii) Approving Authority, (iii) Administrator and (iv) Adjudicating Authority. Under the Act, the penalty for entering into *benami* transactions is imprisonment up to three years, or a fine, or both. The Bill seeks to change this penalty to rigorous imprisonment of not less than one year which may be extended to seven years, and a fine which may extend to 25% of the fair market value of the *benami* property.

The *Benami* Transactions (Prohibition) Amendment Bill, 2015, inter-alia, provides for the following namely:—

**(1) It defines a benami transaction and benami property and also provides for exclusions and transactions which shall not be construed benami:—**

(a) A *benami* transaction has been defined as—

- (i) Where a property is transferred to or held by a person and the consideration for such property has been provided or paid by another person and the property is held for the immediate or future benefit, direct or indirect, of the person providing the consideration ;
- (ii) Where the person who owns the property denies knowledge of the ownership;
- (iii) Where the person providing consideration for the property i.e. real beneficiary is not traceable or fictitious;
- (iv) Where the transaction carried out or made in a fictitious name.

(b) *benami* property is defined as any property which is the subject matter a *benami* transaction i.e. *Benami* Transactions shall include Assets of any kind — movable, immovable, tangible, intangible, any right or interest, or legal documents, etc.

(c) Properties excluded from the definition of *benami* transaction are:—

- (i) Property held in the name of the children or spouse acquired through known sources of income;

- (ii) Properties acquired out of the known sources of income in joint ownership with the brother or sister or any lineal ascendant or descendant ;
- (iii) Properties acquired out of the known sources of income of the Hindu undivided family which are held by a coparcener in a Hindu undivided family;
- (iv) Property held by a person in fiduciary capacity such as a trustee, executor, partner or director of a company.

The above transactions shall not be treated as *benami* transactions and accordingly shall not be subjected to any penal consequences.

***(2) It provides the consequences of entering into a prohibited benami transactions which are:—***

(a) Whoever is found guilty of the offence of *benami* transaction shall be punishable with rigorous imprisonment for a term which shall not be less than one year but which may extend to seven years and shall also be liable to a fine which may extend to twenty-five per cent of the fair market value of the property.

(b) A *benami* property shall also be liable for confiscation by the Adjudicating Authority.

***(3) It lays down the procedure for determination and related penal consequences in the case of a prohibited benami transaction to be as under:—***

(a) Proceedings for inquiring into an alleged *benami* transaction are to be initiated by the Initiating Officer;

(b) The Initiating Officer will refer the case to the Adjudicating Authority set up under the proposed Bill;

(c) The Adjudicating Authority, after providing an opportunity of being heard to the alleged *benamidar*, the beneficial owner, any interested party including a banking company and any other person who makes a claim in respect of the property, shall pass an order within one year, holding the property to be a *benami* property or otherwise;

(d) An appeal against the order of Adjudicating Authority shall lie with the Appellate Tribunal set up under the Bill;

(e) An appeal against the orders of the Appellate Tribunal shall lie with the jurisdictional High Court;

(f) After the order of Adjudicating Authority becomes final, it shall confiscate the properties held *benami*;

(g) Confiscated properties are to be managed and disposed of by officers of the rank of Income-tax Officer who shall be designated by the Central Government as Administrators.

***(4) It also provides that—***

- (a) the powers of civil court shall be available to authorities under the said Act;*
- (b) miscellaneous provisions have been provided for service of notice, protection of action taken in good faith, etc.;*
- (c) the Central Government has been empowered to make rules for the implementation of the provisions of the Bill;*
- (d) it enables the Central Government, in consultation with the Chief Justice of the High Court, to designate one or more Courts of Session as Special Court or Special Courts for the purpose of the Bill; (e) it provides penalty for entering into *benami* transactions and for furnishing any false documents in any proceeding under the Bill;*
- (f) it provides for transfer of any suit or proceeding in respect of a *benami* transaction pending in any court (other than High Court) or Tribunal or before any authority to the Appellate Tribunal as provided in the Bill<sup>6</sup>.*

The bill has been referred to the parliamentary standing Committee for consideration and recommendations, if any.

The absence of a strong law to deal with the deep rooted malady of *benami* transaction continues to be an obstacle in the process of healthy business development in India. If the bill is passed, strict enforcement of the *Benami* Transactions (Prohibition) Act, 1988, could unearth black money hidden through *benami* properties and make property accumulation difficult for corrupt persons and also work as a deterrent for others.

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<sup>6</sup> The Benami Transactions (Prohibition) Amendment Bill, 2015 (as introduced in Lok Sabha).